RE JONG MIN CHEOW; EX P STANDARD CHARTERED BANK MALAYSIA BHD

HIGH COURT SABAH & SARAWAK, KUCHING
STEPHEN CHUNG J
[BANKRUPTCY PROCEEDINGS NO: KCH-29PB-10-7-2017]
13 FEBRUARY 2018

BANKRUPTCY: *Judgment debt – Failure of guarantor/debtor to pay banking facilities – Debtor adjudged bankrupt pursuant to creditor's petition – Application by debtor for discharge of bankruptcy order – Whether grounds for application supported by valid explanation as to why debtor wanted or needed to be discharged – Whether report by Director-General of Insolvency complete – Whether full investigation carried out – Whether court bound to accept report – Bankruptcy Act 1967, s. 33(1) – Bankruptcy Rules 1969, r. 194*

The debtor was a director of Jong Brothers United (Malaysia) Sdn Bhd ('the company') and one of the guarantors of the company in respect of banking facilities of RM5.8 million granted by Standard Chartered Bank Malaysia Bhd ('the SCB') to the company. Due to the failure to pay the banking facilities, a judgment was obtained by SCB against the company and the guarantors. The debtor was adjudged bankrupt pursuant to a creditor's petition filed by SCB. The debtor applied, under s. 33(1) of the Bankruptcy Act 1967 ('the Act') and r. 194 of the Bankruptcy Rules 1969 ('the Rules') that the bankruptcy order be discharged on the grounds that (i) he was 70 years old, unemployed and his wife was a housewife; (ii) the Director-General of Insolvency ('the DGI') made investigations with various agencies which revealed that the debtor had no asset or property; and (iii) he had agreed to pay monthly contributions of RM100 into his account with the DGI since 2012 and these amounted to RM20,482.77 to be paid out as dividends to these creditors. The Senior Assistant Registrar ('the SAR') allowed the application. Hence the present appeal by one of the creditors, namely, Hong Leong Bank Bhd ('the creditor'). In support of its appeal, the creditor submitted that (i) the debtor could not rely on the excuse that he was merely a guarantor as he was a director and involved in the management of the company which owed RM16,067,487.36; (ii) the debtor should not be absolved of his obligations to the creditors; (iii) although the report stated that the debtor had no asset, the DGI carried an onerous task to ensure the bankrupt had no hidden assets and should carry a full investigation and not simply accept statements from the bankrupt or his family; and (iv) total reliance on the report should not be made by the court in granting absolute order of discharge.

Held (allowing appeal in terms):

(1) The debtor, in his statement of affairs, (i) listed his total liability at RM4,722,559.21 to several banks including the creditor and SCB but based on the proof debts, his total liability amounted to RM16,067,487.36; and (ii) admitted owing RM35,379.01 to the creditor but there was no mention of a proof of debt filed by the creditor in the report of the DGI. Furthermore, Aiqon Direct Sdn Bhd filed a proof of debt for RM40,328.95 which was the acknowledged sum but this debt was not included in the debtor's statement of affairs. In the report, AmIslamic Bank filed two proofs of debt which amounted to more than RM11 million. The debtor did not explain whether he owed or disputed the RM11 million to AmIslamic Bank since he did not include AmIslamic Bank as a creditor in his statement of affairs. All of the above were not explained by the DGI in his report. (paras 16-19)

(2) The debtor stated that he was 70 years of age, unemployed and had no assets. However, he did not explain why he wanted or needed to be discharged as a bankrupt. The report also stated that the debtor's wife was a housewife and the debtor lived in a house owned by his wife. However, there was no explanation as to when she acquired the house; whether it was within the three years immediately preceding his bankruptcy, from what means or sources and whether she could afford the house since she was, at all times, a housewife. There was no explanation as to whether the debtor bought the house and put it under her name or whether it was intended to defraud the creditors. (paras 14 & 21)

(3) The application for discharge should have been refused. The DGI did not investigate and did not address the above-mentioned issues and therefore, the report was not a complete report. In an application for discharge, the court shall take into consideration a report of the DGI as to the bankrupt's conduct during the proceedings under his bankruptcy. This is a mandatory requirement. However, the court is not bound to accept it if the court is satisfied that the report is incomplete and unreliable or made based on incomplete investigation into the conduct and affairs of the bankrupt. (paras 15, 22 & 23)

Case(s) referred to:

Abdul Murad Ahmad v. OCBC Bank Malaysia Bhd [2015] 1 LNS 699 HC ***(refd)***

Lim Hun Swee v. Malaysia British Assurance Bhd & Ors And Other Appeals [2010] 8 CLJ 680 CA ***(refd)***

Public Bank Bhd v. Choong Yew Wah [2014] 5 CLJ 695 CA ***(refd)***

Re Lau Kah Lay & Tang Kuong Tiew; Ex P Cold Storage (Malaysia) Bhd [2001] 3 CLJ 960 HC ***(refd)***

Re Mohana Sundari M Subramaniam; ex p United Prime Corporation Bhd [2004] 1 CLJ 624 HC ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 33(1), (3), (4), (6)
Bankruptcy Rules 1969, r. 194
Penal Code, ss. 421, 422, 423, 424

For the creditor - Stephanie Riseng; M/s David Allan Sagah & Teng Advocs
For the debtor - Gordon Tang; M/s Tang Legal Practice

Reported by Najib Tamby

JUDGMENT

Stephen Chung J:

[1] The debtor was a director of Jong Brothers United (Malaysia) Sdn Bhd (company) and one of the guarantors of the company in respect of banking facilities of RM5.8 million granted by Standard Chartered Bank Malaysia Bhd (SCB) to the company. SCB obtained judgment against the company and guarantors after they failed to pay the banking facilities.

[2] On 4 May 2012 the debtor was adjudged bankrupt pursuant to a creditor's petition filed by SCB.

[3] In July 2017, the debtor applied under s. 33(1) of the Bankruptcy Act 1967 and r. 194 of the Bankruptcy Rules that the bankruptcy order made on 4 May 2012 be discharged. The grounds of the application were set out in his affidavit in support of the application.

[4] On 2 November 2017 the Senior Assistant Registrar (SAR) allowed the application with no order as to cost. This is the appeal by one of the creditors namely Hong Leong Bank Berhad (creditor) against the decision of the SAR. The creditor submitted that the SAR had erred in law and in fact. This appeal is by way of rehearing.

[5] Section 33(1) of the Act states that a bankrupt may at any time after being adjudged bankrupt apply to the court for an order of discharge, and the court shall appoint a day for hearing the application.

[6] Under sub-s. (3), on the hearing of the application, the court shall take into consideration a report of the Director General of Insolvency (DGI) as to the bankrupt's conduct and affairs, including a report as to the bankrupt's conduct during the proceedings under his bankruptcy, and may grant or refuse an absolute order of discharge or grant an order of discharge subject to any conditions with respect to earnings or income or his after-acquired property. Subsections (1) and (3) must be read together with sub-ss. (4) and (6) of s. 33 of the Act.

[7] Based on a report prepared by DGI, on 31 May 2012, the debtor filed his statement of affairs listing his debts amounting to RM4,772,559.21 owing to several creditors including SCB, HSBC Bank, Malayan Banking, Hong

Leong Bank and Public Bank. The report showed that the creditors had filed proofs of debt amounting to RM16,067,487.36. The report also stated that the debtor has been paying RM100 per month to Insolvency since June 2012 which amounted to RM20,482.77.

[8] The creditor submitted that the debtor was a director and involved in the management of the company which owed RM16,067,487.36 to the creditors and could not rely on the excuse that he was merely a guarantor. It was submitted that these should not absolve the debtor of his obligations to the creditors. It was submitted that the interest of the public and commercial morality must be preserved at its highest level at all times otherwise it would send out a wrong message, citing the case of *Abdul Murad Ahmad v. OCBC Bank Malaysia Bhd* [2015] 1 LNS 699.

[9] Although the report stated that the debtor has no asset, is physically unwell, has made regular payments and five years have lapsed since he was adjudged bankrupt, it was submitted that these were not justifiable grounds for discharge from bankruptcy. It was submitted that the DGI carried an onerous task to ensure the bankrupt had no hidden assets and should carry a full investigation. It was submitted that the DGI must not simply accept statements from the bankrupt and or his family. It was submitted that the DGI did not set out in his report whether he carried out any such investigation, citing the case of *Re Lau Kah Lay & Tang Kuong Tiew; Ex P Cold Storage (Malaysia) Bhd* [2001] 3 CLJ 960.

[10] It was submitted that total reliance on the report should not be made by the court in granting absolute order of discharge. It was submitted that whilst the report was beneficial in furnishing information on his conduct and his consistent payment, it did not state whether the debtor would continue making payments, for how long and his future financial standing. It was submitted that the monthly payment of RM100 which amounted to RM20,482.77 was insufficient to set-off the debt owing and that the debtor has yet to settle the debts owing to so many creditors. It was submitted that therefore it was unfair and prejudicial to discharge the debtor from further obligations.

[11] Counsel for the debtor submitted that the debtor did not commit any offence under the Act or under ss. 421, 422, 423 or 424 of the Penal Code and that his conduct during and throughout his bankruptcy has been satisfactory. It was submitted the debtor has co-operated fully with DGI and has complied with their requirements to the best of his ability in the management of his bankruptcy and financial affairs.

[12] It was submitted that at the time of the application, the debtor was 70 years of age, unemployed and his wife is a housewife. It was submitted that DGI made investigations with various agencies which revealed that the debtor has no asset or property. The debtor has agreed to pay monthly contributions of RM100 into his account with DGI since 2012 and that these amounted to RM20,482.77 to be paid out as dividends to the creditors.

[13] It was submitted that based on the above factors, the SAR did not err and was right to discharge the debtor unconditionally.

[14] Although the debtor is 70 years of age, unemployed and has no asset, he did not explain why he wanted or needed to be discharged as a bankrupt. He did not provide any plan or his intentions if he was to be discharged as a bankrupt.

[15] In an application for discharge, the court shall take into consideration a report of the DGI as to the bankrupt's conduct and affairs, including a report as to the bankrupt's conduct during the proceedings under his bankruptcy. This is a mandatory requirement. However, the court is not bound to accept it if the court is satisfied that the report is incomplete and unreliable or made based on incomplete investigation into the conduct and affairs of the bankrupt. Without a proper or complete report by the DGI, the court cannot decide on the issue of discharge: *Lim Hun Swee v. Malaysia British Assurance Bhd & Ors And Other Appeals* [2010] 8 CLJ 680; *Public Bank Bhd v. Choong Yew Wah* [2014] 5 CLJ 695.

[16] Firstly, the debtor in his statement of affairs listed his total liability at RM4,772,559.21 to several banks including Hong Leong Bank and SCB. However, based on the proofs of debt, his total liability amounted to RM16,067,487.36. There was no explanation given both by the debtor and DGI on this discrepancy and why there was such a big difference in the two figures.

[17] In his statement of affairs, although the debtor admitted owing RM35,379.01 to Hong Leong Bank, there was no mention of a proof of debt filed by Hong Leong Bank in the report of DGI. During the bankruptcy proceedings, Hong Leong Bank was represented by advocates. There was no explanation whether Hong Leong Bank filed any proof of debt or DGI inadvertently omitted it in the report.

[18] In the report, Aiqon Direct Sdn Bhd filed a proof of debt for RM40,328.95 which was "Jumlah Diperakui" but this debt was not included in the debtor's statement of affairs. There was no explanation by the debtor or DGI.

[19] In the report, AmIslamic Bank filed two proofs of debt which amounted to more than RM11 million. The debtor did not explain whether he owed or disputed the RM11 million to AmIslamic Bank since he did not include AmIslamic Bank as a creditor in his statement of affairs. There was also no such explanation by DGI in his report.

[20] In para. 13 of the report, in the table under column "Jumlah Diperakui", it was stated as "belum diperakui" or not certified. There was no explanation why it was not certified or whether there was no supporting or insufficient documents to substantiate the proofs of debt. There was no explanation why it took so long not to certify or to approve or to reject the

proofs of debt since the debtor was adjudged bankrupt on 4 May 2012, bearing in mind the debtor was a director of the company which was placed under receivership on 7 September 2010 on the application of AmIslamic Bank.

[21] Further, the report stated that the wife was and is a housewife and the debtor lived in the house owned by his wife. There was no explanation when she acquired the house, whether it was within the three years immediately preceding his bankruptcy, from what means or sources and whether she could afford the house since she is at all times a housewife. There was no explanation whether the debtor bought the house and put it under her name or whether it was intended to defraud the creditors.

[22] DGI did not investigate and did not address these issues and therefore the report was not a complete report.

[23] Based on the debts admitted by the debtor amounting to RM4,772,559.21, the proofs of debt amounting to RM16,067,487.36 and his monthly contributions amounting to RM20,482.77 only, this sum will not be able to pay out a dividend of not less than fifty per centum to the creditors. The application for discharge should have been refused.

[24] Based on his age, the operation of the order of discharge shall be suspended for five years until he reaches 75 years of age and he shall continue to pay the monthly RM100 to DGI until he reaches 75 years old. The debtor has been paying RM100 per month since June 2012. He did not say that he was not able to or could not pay this sum of RM100 per month. He did not say that it onerous, oppressive or unconscionable: see *Re Mohana Sundari M Subramaniam ex p United Prime Corporation Bhd* [2004] 1 CLJ 624; [2004] 5 MLJ 227.

[25] The appeal is allowed in terms above. No order as to costs.